cance. Similar protection is afforded to dower,[11] curtesy,[12] and alimony,[13] yet these are mere expectancies,[14] and no one would suggest that their inchoate existence would render constitutional a statute depriving either spouse of the right to dispose freely of his separate property.[15] Secondly, is it true that you may ignore the husband in the protection of the wife? Is he not like a life tenant with power of alienation? It is no mere expectancy that he is deprived of, but the right to sell, waste, give away, or riotously to enjoy.[16] If a husband seized *jure uxoris* cannot be deprived of the right to enjoy the rents and profits,[17] the owner of an easement be deprived of his right of beneficial user,[18] a co-tenant of the right to extract ore,[19] or a husband of the right to convey the homestead,[20] how can this free agent be converted into a Siamese Twin?

The ground of the decision must be, as previously suggested, that the whole institution is so anomalous that common-law analogies are not in point, that the husband, though not a real trustee, is a sort of quasi-trustee, a Spanish distant equivalent of a trustee, for the juristic entity, the community; and that as such he may properly be subjected to a little wing clipping.

NATURE OF RELATION BETWEEN DONEE OF GENERAL POWER OF APPOINTMENT AND PROPERTY SUBJECT THERETO. — A leases property to B for life, and then as C by deed or will shall appoint. What is C's relation to the property? From a study of the cases it is obvious that there exist two wholly distinct and antagonistic conceptions,[1] and that despite their inconsistency either may be applied to the same power by the same court according to the circumstances under which the question is presented.

The first is the strictly technical theory, that C has no interest in the property itself;[2] he is a mere automaton whose function it is to designate another's beneficiary. He is not a conduit of title. He never has title. The appointee takes by relation, not from the instrument executing, but from the instrument creating the power. Accordingly, we find that persons who could not make valid conveyances may exe-

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[11] Swaine *v.* Perine, 5 Johns. Ch. (N. Y.) 482; even though the prospective wife did not know the husband had any property. Chandler *v.* Hollingsworth (N. J.). Cited in 2 BISHOP, LAW OF MARRIED WOMEN, § 343, n.

[12] Freeman *v.* Hartman, 45 Ill. 57.

[13] Murray *v.* Murray, 115 Cal. 266.

[14] Randall *v.* Krieger, 23 Wall. (U. S.) 137. See note on McNeer *v.* McNeer, 19 L. R. A. 256.

[15] Gladney *v.* Snyder, 172 Mo. 318.

[16] Garrozi *v.* Dastas, *supra*; Spreckels *v.* Spreckels, *supra*; Lord *v.* Hough, 43 Cal. 581.

[17] Cases collected in 19 L. R. A. 257, 258.

[18] Eaton *v.* Boston, Concord, & Montreal R. Co., 51 N. H. 504.

[19] See Butte & Boston Consol. Mining Co. *v.* Montana Ore Purchasing Co., 25 Mont. 41.

[20] Gladney *v.* Snyder, *supra*.

[1] Attorney-General *v.* Upton, L. R. 1 Exch. 224, 230, 231.

[2] Middleton *v.* Crofts, 2 Atk. 661; Commonwealth *v.* Williams' Executors, 13 Pa. St. 29; Gilman *v.* Bell, 99 Ill. 144, 150.

cute powers; to wit, infants[3] and married women.[4] So, too, the instrument by which the power is exercised need not be such as would pass title to the property if it actually belonged to the appointor.[5] The donee's creditors cannot seize upon the property,[6] nor compel him to exercise the power in their favor,[7] nor does it pass to his assignee in bankruptcy.[8] His wife gets no dower in the property,[9] and when the appointment is by will the appointees take, not through the donee's executors, but those of the donor.[10] To be sure the donee may by apt words compel the property to pass through his executors, but even then they take not *quâ* executors but as trustees for the appointee.[11]

The second conception is the popular, or layman's theory. This disregards technicalities and looks only to the substance of the situation. The donee may unconditionally dispose of the property to anybody including himself. Why not treat him in law as what he is in substance? Accordingly, for purposes of taxation, the appointee is regarded as inheriting from the one who executes the power,[12] and the latter's creditors may recover the appointed property as though he had fraudulently conveyed away his assets.[13] So, too, in applying the rule

[3] *In re* D'Angibari, 15 Ch. D. 228; Sheldon *v.* Newton, 3 Oh. St. 494, 507. This follows ordinary agency principles. It is changed by statute in some jurisdictions. N. Y. CONSOL. LAWS, 1909, 5013, § 141; WIS. STATUTES, 1898, § 2138; MONT. CODE, 1907, § 4555.

[4] Osgood *v.* Bliss, 141 Mass. 474; Young *v.* Sheldon, 139 Ala. 444.

[5] Murphy *v.* Deichler, [1909] A. C. 446; Goods of Huber, [1896] P. 209. In these cases the donees of English powers were domiciled abroad, and were able to execute the powers by "wills," which, though conforming to English requisites, would have been refused probate at their domiciles. Similarly, the law of the donor's domicile decides whether, given a formally valid document, the words shall be construed to exercise the power. Sewall *v.* Wilmer, 132 Mass. 131; Bingham's Appeal, 64 Pa. St. 345; Cotting *v.* De Sartiges, 17 R. I. 668. *Contra*, *In re* D'Este's Settlement Trusts, [1903] 1 Ch. 898. See 19 HARV. L. REV. 122, 123.

[6] Cleveland Nat. Bank *v.* Morrow, 99 Tenn. 527; Holmes *v.* Coghill, 12 Ves. Jr. 206. But see statutes cited in note 13, *infra*.

[7] Gilman *v.* Bell, *supra*.

[8] Jones *v.* Clifton, 101 U. S. 225.

[9] This was long disputed, especially in the case of powers appendant — see Co. Litt. 216 *a*–248 *a* — but seems settled at last. Ray *v.* Pung, 5 B. & Ald. 561; Moreton *v.* Lees, cited in SUGDEN, POWERS, 8 ed., 144 n. See Maundrell *v.* Maundrell, 7 Ves. Jr. 566; 10 Ves. Jr. 246.

[10] *In re* Thurston, 32 Ch. D. 508; *In re* Davies' Trusts, L. R. 13 Eq. 163. *Cf.* Chamberlain *v.* Hutchinson, 22 Beav. 444.

[11] *In re* Treasure, [1900] 2 Ch. 648, 652; *In re* Dodson, [1907] 1 Ch. 284. *Contra*, *In re* Fearnsides, [1903] 1 Ch. 250. See 16 HARV. L. REV. 376.

[12] Attorney-General *v.* Upton, L. R. 1 Exch. 224; Minot *v.* Stevens, 93 N. E. 973 (Mass.); *In re* Kissell's Estate, 121 N. Y. Supp. 1088; Chanler *v.* Kelsey, 205 U. S. 466. But the degrees of relationship are reckoned from the donor of the power. Commonwealth *v.* Williams' Executors, *supra*; *In re* Barker, 7 H. & N. 109.

[13] Fleming *v.* Buchanan, 3 De G., M. & G. 976; Clapp *v.* Ingraham, 126 Mass. 200. The analogy of a fraudulent conveyance is not strictly accurate. (1) The donee's own property must be exhausted before any of the appointed property can be reached. Bainton *v.* Ward, 2 Atk. 172. See Fleming *v.* Buchanan, *supra*; White *v.* Mass. Inst. of Technology, 171 Mass. 84, 96. (2) The appointee will lose his preference even though he is a *bonâ fide* purchaser. Beyfus *v.* Lawley, [1903] A. C. 411. *Contra*, Patterson *v.* Lawrence, 83 Ga. 703. The doctrine that appointed property is assets was disapproved of in Commonwealth *v.* Duffield, 12 Pa. St. 277; and denied in Humphrey *v.* Campbell, 59 S. C. 39. See Wales *v.* Bowdish, 61 Vt. 23; Patterson *v.* Lawrence, *supra*. Statutes in several jurisdictions subject the property to seizure by creditors of the donee even before appointment. ALA. CIVIL CODE, 1907, § 3423; N. Y. CONSOL. LAWS, 1909, 5015, § 149; WIS. ST., 1898, § 2108.

against perpetuities, a general power is treated as practically identical with ownership.[14] By dealings inconsistent with the existence of the power a donee is estopped to derogate from his own grant,[15] though a guilty trustee is not.[16] And finally, a universal legacy of "all my property" will pass the property subject to the power.[17]

The conflict between the two theories was neatly illustrated recently. The donee of an English power was domiciled in Holland. By the laws of Holland no person may dispose by will of over seven-eighths of his property, the devolution of the residue being prescribed by law. By a will executed in accordance with all the formal requisites of both countries, she left to her husband "all the property which the law would allow her to dispose of." It was held that the husband took the entire property, not merely seven-eighths. *Re Pryce*, 130 L. T. 415 (Eng., Ch. D., Feb. 20, 1911). Clearly the real question was as to the nature of her relation to the property. It is submitted that the court rightly regarded it as one of agency. The technical doctrine should be disregarded only for strong equitable reasons. On principle there can be no difference between barring dower and barring statutory devolution; nor between allowing the appointee to take under a will which by the law of the donee's domicile could have passed none of his property, and allowing him to take under a will which by the same law could have passed only seven-eighths.[18]

OBEDIENCE TO ORDERS AS JUSTIFICATION FOR SOLDIER. — Under the federal Constitution, there are three kinds of military jurisdiction: military law, military government, and martial law.[1] "Martial law proper is called into action . . . in times of insurrection or invasion within districts or localities where ordinary law no longer adequately secures public safety and private rights." [2] In some states in times of insurrection, governors have declared a state of "qualified" martial law.[3] And the right so to do has been recognized by the United States Supreme Court.[4] Under martial law, the military overrides the civil power, so

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[14] A general power is not void although it may be exercised at a remote period. Bray *v.* Bree, 2 Cl. & F. 453. The remoteness of an appointment under a general power is reckoned, not from the date of the creation of the power, but from the date of its execution, Mifflin's Appeal, 121 Pa. St. 205; unless the power is exercisable by will only, Genet *v.* Hunt, 113 N. Y. 158; *In re* Powell's Trusts, 39 L. J. Ch. 188. *Contra*, Rous *v.* Jackson, L. R. 29 Ch. D. 521; *In re* Flower, 34 Wk. Rep. 149.

[15] Horner *v.* Swann, 1 Turn. & R. 430. See West *v.* Berney, 1 Russ. & M. 431.

[16] Wetmore *v.* Porter, 92 N. Y. 76.

[17] Wills Act, 1 VICT. c. 26, § 27; Sewall *v.* Wilmer, *supra*. *Contra*, Cotting *v.* De Sartiges, *supra*.

[18] Query: could a statute at the donee's domicile affect his relation to foreign property under a foreign power?

[1] This is the classification of Chase, C. J., in *Ex parte* Milligan, 4 Wall. (U. S.) 2, 141.

[2] See *Ex parte* Milligan, *supra*, 142.

[3] Commonwealth *ex rel.* Wadsworth *v.* Shortall, 206 Pa. St. 165; *Re* Moyer, 35 Colo. 159.

[4] See Luther *v.* Borden, 7 How. (U. S.) 1, 45. This case arose in connection with the Dorr Rebellion in Rhode Island. A late federal case upholds the governor's proc-